No. 19-1031

IN THE

Supreme Court of the United States

ERIN CAPRON; JEFFREY PENEDO; CULTURAL CARE, INC., D/B/A CULTURAL CARE AU PAIR,

Petitioners,

v.

OFFICE OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS; MAURA T. HEALEY, IN HER CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE ALLIANCE FOR INTERNATIONAL EXCHANGE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether federal law preempts the application of state and local labor laws to the terms and conditions of participation in the federal au pair program.

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INTEREST OF THE *AMICUS CURIAE*

The Alliance for International Exchange ("The Alliance") is an association of approximately 90 nongovernmental organizations, including Petitioner Cultural Care, Inc., comprising the international educational and cultural exchange community in the United States. Founded in 1993, the Alliance serves as the only collective public policy voice of the exchange community. Among its members are entities designated by the Department of State ("DOS") to sponsor the J-1 visas of au pair program participants. As the voice of international exchange in the United States, the Alliance promotes the growth and impact of exchange programs by engaging in advocacy, providing member development opportunities, and building public awareness of the power of exchange. In so doing, the Alliance seeks to further the mission mandated by the Fulbright-Hays Act: "increasing mutual understanding between Americans and others through people-to-people contact." 60 Fed. Reg. 31 at 8547 (Feb.15, 1995).[1]

The experience and relationships gained through international exchange are essential to furthering mutual understanding and international cooperation between peoples. Data shows that foreign exchange participants complete their programs with a better impression of their

1. Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of amicus to file this brief. All parties consented to the filing of this brief.

host country and its people. U.S. ambassadors consistently rank exchange programs among the most useful catalysts for long-term political change and mutual understanding. *See, e.g.,* United States. Cong. Senate. *Resolution Expressing the sense of the Senate that international education and exchange programs further United States national security and foreign policy priorities, enhance United States economic competitiveness, and promote mutual understanding and cooperation among nations, and for other purposes.* 115th Cong. 1st sess. S. Res. 357 (12/12/17) https://www.congress.gov/bill/115th-congress/senate-resolution/357/text.

The First Circuit's decision, which holds that the Massachusetts Domestic Workers Bill of Rights ("DWBOR")[2] is not preempted by federal law and regulations governing the au pair program, threatens the very existence of the federal au pair program. It already is frustrating the purpose of the Fulbright-Hays Act by all but eliminating the foundational cultural exchange element, destroying the DOS's policy of uniformity, and focusing the program on wage earning rather than people-to-people exchange. Further, the Massachusetts Act will discourage host families from spending time interacting with their au pairs (a primary purpose of the program), lest they be required to pay the au pair for time spent with the family that state law classifies as work hours. Mutual understanding and international cooperation—the goal behind the program—necessarily will suffer as a result.

The Court should grant certiorari to reverse and prevent the spread of these deleterious effects.

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2. The DWBOR and its implementing regulations are found at Mass. Gen. Laws ch. 149, § 190 and 940 CMR §§ 32.00, *et seq.*

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Circuit's decision, reported at 944 F.3d 9, ignores fundamental conflicts between the Massachusetts law it upholds, and the carefully calibrated federal statutes and regulations that have governed the au pair program since its inception. It also ignores the views of the DOS, which the First Circuit sought before issuing its decision. In so doing, the First Circuit has dealt a crippling blow to the uniformity upon which the program relies by opening the door to application of an incongruent patchwork of state and municipal laws and regulations.

By allowing state and local laws to supersede the federal regulations that historically have governed the au pair program, the First Circuit's decision will essentially require that different wages are paid to au pairs in different states, which will encourage au pairs to prefer host families from higher wage states and localities to the detriment of host families from lower wage states. Lower income families in higher wage states will struggle to participate in the program. Confining the au pair program to a privileged slice of American society—high income families in high wage locations—is directly contrary to the purpose of cultural exchange. It deprives families with lower incomes, and those from lower wage areas, of an important cultural exchange opportunity, while simultaneously depriving au pairs of unique experiences they might have with such families.

Similarly, application of DWBOR and other state laws mandating compensation of workers for all time they are required to spend on the employer's premises threatens

to upend the program by rendering it prohibitively expensive. Federal regulations limit au pairs to 45-hours of work per week, but also *require* au pairs to live with their host families. Host families cannot possibly comply with both state and federal law under such circumstances, as few families can afford to pay their au pairs for nearly every hour of every day. These and similar negative effects already are being felt. Emboldened by the First Circuit's decision, plaintiffs already have named members of The Alliance in new lawsuits, with more litigation expected—and at least one member already has stopped placing au pairs in Massachusetts.

Allowing the First Circuit's decision to stand while additional lawsuits work their way through the courts will result in continued and perhaps irreparable damage to the au pair program and its foreign policy goals. Certiorari should be granted.

ARGUMENT

The First Circuit's decision to uphold application of the Massachusetts Domestic Workers Bill of Rights to the au pair program conflicts with the principal purpose for which the federal program was designed and conflicts with federal regulations. If the First Circuit's decision stands, it will effectively destroy the program by allowing every state—and potentially every city or county within each state—to apply its own conflicting laws.

As stated by U.S. Representatives Robert Goodlatte and Edward R. Royce in a July 26, 2017, letter to then Secretary of State Rex Tillerson prior to the First Circuit's decision, "allowing state and local governments to enact

thousands of potentially conflicting regulations governing the federal au pair program would be untenable and would likely result in the death of this valuable program." *See Cultural Care, Inc. v. Office of the Attorney General of the Commonwealth of Massachusetts, et al.*, No. 1:16-cv-11777 (D. Mass.), Goodlatte and Royce Letter to Sec. Tillerson (D.E. 40 at Ex. 1) (Aug. 15, 2017). Stanley Colvin, former attorney-advisor to the United States Information Agency and the DOS, and a former Deputy Assistant Secretary of State for Private Sector Exchange—and the principal author of the formative federal au pair program regulations—explained that:

> Uniformity was and is required because the Exchange Visitor Program, including the Au Pair Program, is a foreign affairs function of the United States Government implemented nationwide. Lack of uniform implementation necessarily raises the spectre of negative foreign diplomatic relations, which in turn would undermine the purpose of the Au Pair Program and its foreign relations value.

See Beltran v. InterExchange, Inc., et al., No. 1:14-cv-03074 (D. Colo.), Colvin Declaration (D.E. 861-1 at 59-68, ¶ 14) (Feb. 16, 2018).

Destroying the uniformity established (and required) under federal law and regulations would have numerous negative consequences for the au pair program and its important foreign policy purpose of furthering international relations. Indeed, the decision already is having a significant and deleterious impact on the citizen-to-citizen aspect of U.S. domestic diplomacy furthered by the au pair program.

I. The First Circuit's Decision Will Destroy the Nationwide Nature of the Au Pair Program and Damage the Goals of Cultural Exchange and Mutual Understanding

The fixed stipend paid by host families to their au pairs is based on a formula that incorporates the federal minimum wage as set forth in the Fair Labor Standards Act. *See* 22 C.F.R. § 62.31(j)(1). The current Federal minimum wage is $7.25 an hour. 29 U.S.C. § 206(a)(1)(C). The Massachusetts minimum wage, in contrast, is $11.00 an hour. M.G.L. ch. 151, § 1. Massachusetts is not alone. According to the U.S. Department of Labor, twenty-nine states, the District of Colombia, Guam, and the Virgin Islands have a minimum wage that exceeds the federal minimum wage. *See* https://www.dol.gov/whd/minwage/mw-consolidated. htm (*last visited* March 16, 2020). Sixteen states and Puerto Rico have minimum wages that mirror the federal minimum wage and five states are silent on the subject. *Id*. *See also* http://laborcenter.berkeley.edu/ minimum-wage-living-wage-resources/ inventory-of-us-city-and-county-minimum-wage-ordinances/ (*last visited* March 16, 2020) (listing more than 50 counties and municipalities with minimum wage ordinances).

Requiring host families to pay au pairs different wages depending on their states (or cities/counties) of residence would have significant consequences. For example, it would create a powerful incentive for au pairs to favor placement in the states, cities, and counties—like Massachusetts—with a minimum wage that exceeds the federal requirement. Understandably, au pairs would likely prefer such locales, and attempt to avoid lower wage states. The federal program requires that host families

provide au pairs with room and board regardless of where the host family resides. As required by federal regulation (*see* 60 Fed. Reg. 31) the room and board offset to wages is a set amount, regardless of its actual value. Therefore, the traditional argument for increased minimum wage (the higher cost of living in a particular jurisdiction) is largely irrelevant to au pairs, who cannot under the federal au pair regulation bear such costs.

Further, the combination of an increased wage and what are often more desirable (or perhaps just better-known) locations provides a disincentive for au pairs to accept placements in lower wage jurisdictions. If state and local wage laws are allowed to preempt federal law, as the First Circuit has held, au pairs as a group will be deprived of experiencing the cultures of certain states, limiting the citizen-to-citizen connection and affording contact only with a rarified portion of the diverse United States. Similarly, prospective host families in the lower wage jurisdictions would be deprived of exposure to the diverse cultures that au pairs provide during their time in the U.S. Such state and local laws would thus diminish the scope of cultural exchange Congress intended.

In short, applying the minimum wage laws of each state/locality to the au pair program will shift the focus of the program from cultural exchange to wage-earning, divert the program to host families in higher wage jurisdictions (or eliminate such jurisdictions altogether, given the inability to comply with both state and federal law simultaneously), and deprive both au pairs and prospective host families of the citizen-to-citizen contact that is integral to improving international understanding that the au pair program was designed to provide. Indeed,

the very fact that the au pair program resides with the U.S. Department of State, rather than the Departments of Labor or Homeland Security is reflective of its primary purpose: building international relationships. Allowing political subdivisions to pick apart this cohesive federal program will necessarily transform these individual ambassadorships into nothing more than sterile employment relationships, defeating the program's goal and leading to its demise.

II. The First Circuit's Decision Will Destroy Important Aspects of the Au Pair Program

A crucial aspect of the au pair program's goal of cultural exchange is that au pairs live with their host families so that they can "participate directly in the home life of the host family." 22 C.F.R. § 62.31(a). The intent is to "increase mutual understanding between Americans and others through people-to-people contact." 60 Fed. Reg. 31 at 8547 (Feb. 15, 1995). To further this goal, DOS requires that the host family "include the au pair whenever possible in family meals, outings, holidays and other events." *See* https://j1visa.state.gov/programs/au-pair#hostsemployers (*last accessed* March 16, 2020).

DWBOR, however, requires that domestic workers be compensated for all time they are required to be on the employer's premises. Under that law, employers may deduct limited amounts for room and board only if the room and board are "voluntarily and freely chosen" by the domestic worker and agreed to in writing, 940 CMR §§ 32.02, 32.03. Applying this and similar laws enacted across the United States will result in destruction of the program and its intent to facilitate, on a personal level, international relations and global understanding.

As an initial matter, applying to au pairs the DWBOR provision requiring compensation of domestic workers for all time they are required to be on the employer's premises would violate federal law, which allows au pairs to work no more than 45 hours per week and requires them to live and engage as much as possible (including during non-working hours) with the host family. DWBOR requires host families to categorize as "hours worked" the time an au pair spends eating dinner with the family, playing a board game together, time spent discussing their respective cultures, and the hours au pair spends sleeping "on the premises." Under federal law, au pairs have no choice but to reside on the host family's premises; and host families have no choice under the federal regulations but to require au pairs to live and board with the family. This incompatibility between the federal programmatic requirements and Massachusetts wage law is just one example of why federal law alone must control the issue of wages, room, and board provided and paid to au pairs.

Beyond the violation of federal law imposed by the Massachusetts mandate, because au pairs would have to be paid for almost 24-hours out of every day, few families will be able to participate in the program. The expense, combined with the impossibility of complying with the federal law's room/board and 45-hour work week mandate in Massachusetts, effectively will eliminate the au pair program in the state and in other locations with similar laws.

III. The First Circuit's Decision Will Create Insurmountable Administrative Problems for Host Families that Would Discourage Participation

The au pair program was designed with uniformity and paperwork simplicity in mind to create a system that is "fair to host families and au pairs." 60 Fed. Reg. 31 at 8551. For example, the stipend mandated under federal law is based on 45 hours of child care services per week, regardless of whether fewer hours are performed. Federal law prohibits au pairs from exceeding the 45-hour/week maximum; DWBOR allows domestic workers to work additional hours (beyond the 45 allowed by au pairs) at an overtime rate of pay, another tension between the two laws. The 45-hour stipend rate does not decrease if the au pair spends less time on child care, nor does it require documentation of the costs associated with room and board. 22 C.F.R. § 62.13(j)(1). In contrast, the Massachusetts regulations impose a significant administrative burden on host families.

Instead of paying a predetermined weekly stipend, host families trying to determine the appropriate wage under DWBOR will be required to calculate the amount of "working time" (including meal periods, rest periods and sleep periods, absent a written agreement to exclude such periods from working time), 940 CMR § 32.02, and multiply the number of weekly hours of working time by the Massachusetts minimum wage, 940 CMR § 32.03(3).

Two aspects of DWBOR are prohibited under the federal au pair program regulations: (1) the DWBOR's requirement that employer's track and deduct the cost of each meal (if the au pair voluntarily and freely agrees to

that deduction in writing), *compare* 940 CMR § 32.02 *with* 59 Fed. Reg. 64,298; and (2) the DWBOR's requirement that an employer must calculate and deduct the actual cost of lodging up to certain limits (if the au pair voluntarily and freely chooses to accept lodging from the host family), *compare* 940 CMR § 32.03(5)(c) *with* 22 C.F.R. §62.31(a) and 59 Fed. Reg. 64,298-99. A host family also will be required to maintain detailed records of wages and hours for three years, 940 CMR § 32.04(2), as well as records of its written agreements with their au pair that cover everything from lodging and meals, to sick days and the process for raising and addressing grievances, 940 CMR § 32.04(3).

Host families who wish to welcome an au pair for purposes of cultural exchange should not be deterred by this onerous burden. Requiring them to comply with DWBOR not only runs contrary to federal regulations, but also will discourage participation in the au pair program, frustrating its foreign policy goals of promoting international cultural exchange and mutual understanding.

IV. The First Circuit's Decision Will Negatively Impact Sponsors' Participation in the Program

The mission of the Alliance, whose membership includes entities designated by the DOS to sponsor the J-1 visas of au pair program participants, is to promote the growth and impact of international exchange programs as part of the DOS's larger foreign policy initiative. In addition to DWBOR's impact on host families and au pairs, it also is likely to have foreseeable and unforeseen negative consequences for the au pair program sponsors.

Federal regulations charge sponsors with a number of responsibilities. *See generally* 22 C.F.R. § 62.31(c)-(m). These include placing au pairs with eligible host families, limiting au pair participants to no more than 10 hours of child care services per day up to a maximum of 45 hours per week, providing orientations for host families and au pairs, and monitoring program participants. Application of the labor and employment laws of all states and their political subdivisions to the au pair program—many of which are contrary to the governing federal regulations—inappropriately enlarges this oversight responsibility and requires sponsors to develop and maintain expertise about not just the federal laws applicable to au pairs, but also the laws of all 50 states and innumerable cities and counties. Sponsors, who presently are governed by and assist in implementing federal law, may themselves face laws in other political subdivisions (including DWBOR) that contradict federal mandates. To fulfill their obligations to host families and au pairs, sponsors may be required to assist in enforcing a panoply of potentially contradictory local, state and federal laws. They will have to explain to an au pair in Nebraska why her wages are less than those of a peer in Massachusetts, and explain to a Massachusetts au pair why she cannot participate in more host family-centered activities, all of which may have federal diplomatic repercussions. The First Circuit's decision, particularly given the likelihood of its expansion if other courts follow suit, would frustrate the foreign policy goals of the au pair program and shrink, rather than foster, international exchange.[3]

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3. Despite the First Circuit's assertion that relevant state laws do not conflict with the applicable federal laws because the latter apply only to sponsors, while the former apply only to host

V. The Negative Effects of the First Circuit's Decision Already Are Being Felt

The negative effects described above are not theoretical. Instead, these effects are occurring *now* and are impacting au pairs, host families, and sponsors alike.

Indeed, at least one member of the Alliance, EuAupair, already has suspended its operations in Massachusetts as a result of the First Circuit's decision. *See* https://www.wgbh.org/news/local-news/ 2020/02/05/citing-labor-law-ruling-au-pair-agency-suspends-operations-in-massachusetts?fbclid=IwAR03O_mPX7is_fnrGKdqvMfOd6m3ZhTJ97RSp7z57F9DJbaedZC2Dw6vrls(*last visited* March 16, 2020). Other sponsors also may be forced to suspend operations in states with employment laws that affect the au pair program if the First Circuit's decision is not reviewed and reversed. Moreover, at least two lawsuits already have been filed against members of The Alliance as a result of the First Circuit's ruling. The first, *Muñoz v. Au Pair Care, Inc., et al.,* Civil Action No. 2020-82 (Mass. Sup. Ct., Middlesex Cty), is a January 9, 2020, lawsuit filed by a former Massachusetts au pair on behalf of herself and approximately 500 putative class members, which seeks at least $10 million in back pay. *See* https://www.universalhub.com/2020/au-pair-sues-back-pay-after-court-rules (*last visited* March 16, 2020). The second, *Maldonado v. Cultural Care, Inc.*, No. 1:20-cv-10326 (D. Mass.), is a February 19, 2020, collective action for alleged violations of the Fair Labor Standards

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families, Respondents have publicly announced their intention to enforce the Massachusetts Act against the sponsors. App.27, 29, 49-50, 62-63.

Act filed by plaintiffs from Massachusetts, New York and California. *See* https://www.law360.com/employment/articles/1245270/-au-pair-co-hit-with-flsa-suit-after-1st-circ-wageruling?copied=1 (*last visited* March 16, 2020) and https://www.reuters.com/article/employment-aupairs/au-pair-agency-accused-of-stiffing-consultants-on-ot-pay-idUSL1N2AJ21W (*last visited* March 16, 2020). The Alliance anticipates that the number of lawsuits will continue to grow, further threatening the viability of the federal au pair program.

Host families have already been affected by the First Circuit's decision. In a recent Alliance member survey, sponsor agencies reported that host families have expressed concerns regarding:

- Increased cost of hosting an au pair;
- Seeking alternative care due to uncertainty, restrictions, and emotional investment in a fundamentally altered au pair program;
- Hosting an au pair increasingly feels like an employer/employee relationship, rather than a familial/cultural exchange relationship.

On average, those members of The Alliance who responded to the informal survey estimated that 31 percent of host families in Massachusetts will leave the program in 2020 as a result of the First Circuit's ruling, and that there will be a corresponding 76 percent reduction in new Massachusetts host family placements. Already, many Massachusetts-based au pairs had to be placed with new families because their original host family could not afford to continue in the program.

Au pairs are spending less time with their host families because host families fear that any interaction will be viewed as compensable work time. This fear has resulted in a diminution of the participants' cultural exchange, which was the main impetus for creating this foreign policy program in the first place. The vast majority of Alliance members estimate that, due to the dearth of host families, more than 50 percent of au pairs will leave the program if the First Circuit's decision is replicated elsewhere.

In other words, there is no time or ability to delay consideration of this issue; the foreign policy effects of the First Circuit's decision have been felt already by au pair program participants. The First Circuit's decision should be reviewed now, to reverse course before additional damage is done.

CONCLUSION

The First Circuit's decision, by ignoring the inherent contradictions between state law, the applicable federal law and regulations, and the underlying purpose of the U.S. State Department's program, risks imminent damage to the au pair program and its foreign policy goal of cultural exchange.

The petition for a writ of certiorari should be granted.

DATED: March 2020

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